

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6265

APPEAL OF ANNELIESE SIMMONS AND JILL HEEMSKERK

OPINION OF THE BOARD

(Hearing held March 18, 2009)
(Effective Date of Opinion: April 9, 2009)

Case No. A-6265 is an administrative appeal filed June 25, 2008 by Anneliese Simmons and Jill Heemskerk (the “Appellants”). The Appellants charge error on the part of the County’s Department of Permitting Services (“DPS”) in the issuance of Building Permit No. 480035, dated March 14, 2008, for the construction of a retaining wall at the property located at 6001 Manor Oak Way, Bethesda, Maryland 20814 (the “Property”) in the R-60 zone. Specifically, the Appellants assert that the retaining wall is not built in accordance with the plans filed with the County, and that it violates County side and rear setback requirements. They also expressed concern about a privacy fence constructed in connection with the retaining wall. Ryan Lahuti, who owns the subject Property with his wife, was permitted to intervene in this matter (the “Intervenor”).

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the “Zoning Ordinance”), the Board scheduled a public hearing on the appeal, with oral argument on preliminary motions to be held March 18, 2009. Pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on preliminary Motions to Dismiss filed by the County and by the Intervenor, and on Opposition thereto filed by the Appellants. Assistant County Attorney Malcolm Spicer represented the County. The Intervenor was represented by Nancy Pollack, Esquire. The Appellants appeared pro se.

Decision of the Board: Motions to Dismiss **granted**; administrative appeal **dismissed**.

RECITATION OF FACTS**The Board finds, based on undisputed evidence in the record, that:**

1. The Property, known as 6001 Manor Oak Way, Bethesda, Maryland, is an R-60 zoned parcel identified as Lot 11, Block E, in the Ligon Knolls subdivision.
2. The Appellants are adjoining neighbors, residing in properties that back to the subject Property.
2. On March 14, 2008, DPS issued Building Permit No. 480035 for the construction of a retaining wall at the subject Property. See Exhibit 3(a).
3. On June 25, 2008, the Appellants filed appeal A-6265, challenging the issuance of Building Permit No. 480035. See Exhibit 1(a).

MOTIONS TO DISMISS—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that the building permit for the retaining wall was issued on March 14, 2008, and that the June 25, 2008 appeal was therefore untimely, and must be dismissed. The County argued that Section 8-23(a) of the County Code provides that “[a]ny person aggrieved by the issuance ... of a permit ... under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued....” The County argued that under *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55 (1980), *cert. denied*, 289 Md. 738 (1981), and under *United Parcel Service, Inc. v. People's Counsel*, 336 Md. 569; 650 A.2d 226 (1994), statutes that set forth time limits for the filing of appeals are jurisdictional, and failure to comply with those time limits is fatal, and deprives the Board of jurisdiction over the appeal.

Counsel for the County clarified that there is no “posting” requirement for a building permit that is issued for the construction of a retaining wall. He stated that Section 8-25(a) of the County Code and the regulations implementing that section are very specific as to the types of construction that require posting, and that they do not include the construction of retaining walls. Counsel acknowledged in response to a Board question that if posting were required in this case, and the building permit were not posted within the requisite 3 days, the time for appeal would probably have been extended. In response to another Board question, Counsel stated that when neighbors see construction but do not see a posted building permit, they can check the DPS website or call DPS to see what is happening.

When asked at what point a fence becomes an accessory structure, Counsel stated that fences are considered accessory structures, but are permitted under an exemption in the Zoning Ordinance to be located close to the property line unless they are taller than 6.5 feet. See 59-B-2.1. He said that fences taller than 6.5 feet have to comply with the

setbacks for accessory structures. He noted that fences that were constructed with a proper permit can be replaced without obtaining a new permit.

2. Counsel for the Intervenor put forth much the same argument as the County, reiterating the mandatory nature of the 30-day time limit for filing appeals. In addition, Counsel argued that this deadline is posted on the DPS website, and thus that the public is on notice of this requirement.

3. Appellant Simmons argued that if a neighbor has no way of knowing what is going on at a neighboring property, and has a hard time discerning the nature of the activity despite efforts to do so, it is hard for that person to appeal the action in a timely manner. She stated that she had difficulty getting accurate information from both the Intervenor and from the County. Appellant Heemskerk stated that two building permit notices were posted on the Property at the start of construction in mid-March, but that they were not readily visible to the neighbors and were not dated. She testified that she and Appellant Simmons initially thought the notices were caution signs.

Appellant Simmons testified that the Intervenor had told them in February that he planned to build a 3.5 foot retaining wall, and that no permit was required. She testified that when she noticed construction materials being delivered to the Property, a complaint was filed and the County said the work should not begin without a permit. She testified that between March and May, she and Appellant Heemskerk had numerous (six) contacts with the County, but that no one informed them about the 30-day deadline within which to appeal the building permit.¹ She argued that there appeared to be a deliberate attempt to run out the clock, with the end result being that she and Appellant Heemskerk would lose their ability to appeal this permit, which she said is the right of any citizen.

Appellant Heemskerk testified, in response to Board questions, that she first saw a copy of the building permit at issue on or about June 7, 2008. Appellant Simmons stated that the permit says it is for a retaining wall not to exceed 10 feet in height. Appellant Heemskerk testified that she and Appellant Simmons didn't know about the 6.5 foot fence on top of the retaining wall until May, and argued that the combined wall/fence structure requires a five foot setback, but was only setback 1.5 feet from the property line.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including Section 8-23.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County

¹ Appellant Heemskerk stated that the County had given them conflicting information as to whether a permit was required for the fence, that they had pursued this through DPS, and that the only reference they saw to the Board of Appeals was on the posted permit.

government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of the hearing or, as was the case here, to bifurcate the proceedings and set a separate hearing date for preliminary motions. In the instant matter, the County and the Intervenor each filed a Motion to Dismiss, and the Appellants filed an Opposition to those motions. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for lack of jurisdiction (Rule 3.2.1).

4. Section 8-23(a) of the County Code provides that “[a]ny person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued.”

5. Section 8-25A of the County Code provides for public notice of certain types of building permits via a posting requirement, as follows:

Sec. 8-25A. Permits affecting certain residential properties; public notice.

(a) If a permit is issued under Section 8-25 for new construction on vacant residentially or agriculturally zoned land, or construction of a building or structure that would affect the footprint or height of any existing structure located on residentially or agriculturally zoned land or that is exempt from and exceeds any applicable building height limit, the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a).

(b) The regulations adopted under subsection (a) may allow a central sign to be posted, or otherwise vary the design, content, size, or location requirements, for any subdivision that consists of more than 5 new dwellings at a single site.

(c) The recipient must post the required sign within 3 days after the Department releases the permit to the recipient, and must maintain the sign until 30 days after the permit was released.

(d) If the recipient of a permit does not post a sign as required by this Section, the permit is automatically suspended until the recipient has posted the proper sign. If the recipient begins work under the permit without having posted the sign as required, the Director must immediately issue a stop work order. During the 30-day period after the sign is properly posted, any person may appeal

the issuance of the permit as if the permit had been released to the recipient on the day the sign was posted.

6. The Board finds that the evidence in the record indicates as a factual matter that this appeal was filed more than 30 days after the issuance of Building Permit No. 480035, the permit having been issued on March 14, 2008, and the appeal filed on June 25, 2008. See Exhibits 1(a) and 3(a). The Board further finds that Section 8-23(a) of the Montgomery County Code requires that appeals be filed within 30 days after a permit is issued, and that case law in Maryland makes clear that this time limit is jurisdictional and mandatory. See *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 196-7, 422 A.2d 55, 59 (1980), cert. denied, 289 Md. 738 (1981).

In addition, the Board finds that under Section 8-25A of the County Code, there is no posting requirement for the issuance of a building permit for a retaining wall. Thus the Board concludes that the time in which to appeal Building Permit No. 480035 could not have been extended beyond the usual 30 days due to improper posting. As a factual and legal matter, the Board therefore concludes that it has no jurisdiction to hear this appeal because it was filed more than 30 days after the issuance of Building Permit No. 480035, and that the appeal must be dismissed.

7. The Motions to Dismiss in Case A-6265 are granted, and the appeal is consequently **DISMISSED**.

On a motion by Vice Chair David K. Perdue, seconded by Chair Catherine G. Titus, with Members Walter S. Booth and Carolyn J. Shawaker in agreement, and with Member Stanley B. Boyd opposed, the Board voted 4 to 1 to grant the Motions to Dismiss and thus to dismiss the appeal, and adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

David K. Perdue, Vice-Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of April, 2009.

Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).